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Supreme Court of the United States.

SPEECH OF HON. E. B. GARY, JULY 4, 1901.

Mr. President:

Cicero, when reviewing the opinions on the nature of the soul, coming to that of a musician, who held the soul was but an harmony, pleasantly said: "This man has not gone out of his art."

I have selected as the subject of my remarks, the Supreme Court of the United States, and, to those who would say: "This man has not gone out of his art," I quote the words of Mr. Blackstone: "In most of the nations of the continent, . . . no gentleman, or at least no scholar, thinks his education is completed, till he has attended, a course or two of lectures. . . . . And in the northern parts of our own island, . . it is difficult to meet with a person of liberal education, who is destitute of a competent knowledge in that science, which is to be the guardian of his natural rights, and the rule of his civil conduct." It is in consequence of their greater familiarity, with the science of government, that the members of the legal profession, have been foremost, in resisting tyranny and oppression, in every age.

Taking a retrospective glance, at the origin and ground work, of the Constitution creating the said Court, we find that it was based upon the "articles of confederation," which in a degree, at least, were the outgrowth of the original, "league of friendship" of 1643.

The views of the framers of the Constitution, were kaleidoscopic, and discordant. There was not a member of the convention, who lent his approval to all its features, and it was regarded as a patchwork of compromises. It left the hands of its framers, without a single express provision, upon which it had the right to rely, for a judicial construction, that would save it from death, by giving it vital force.

It failed to provide, (which it could have done in half a dozen words), whether a State had the right to secede, thus leaving the question to be determined, by the arbitrament of the sword.

It likewise failed, although it was the avowed purpose of the Convention to provide a check on every department of the government, by creating a judicial department with imperial powers.

They remembered that in monarchial governments, the liberties of the subjects were curtailed, by the dependence of the judiciary on the favor of the Crown, but forgot that in avoiding this evil, they might create a Court with monarchial powers. This branch of the government received far less consideration in the convention, than either the executive or legislative departments, due in a measure to the fact, that there was very little work at that time for the Court. It was in its infancy, looked upon as insignificant, and for this reason the Chief Justiceship was rejected by at least two persons to whom the appointment was offered. After the adjournment of the convention, Governneur Morris, a delegate from Pennsylvania, wrote to a friend stating that he had been instrumental in planting in the constitution, germs that would ultimately make this an imperial government.

The address of Luther Martin, a delegate from Maryland in the convention, delivered to the legislature of that State, shows that there were others in the convention, who wished to make our government a monarchy. He said: "It may be proper to inform you, that, on our meeting in convention, it was soon found there were among us, three parties, of very different sentiments and views.

One party, whose object and wish it was, to abolish and annihilate all State governments, and to bring forward one general government, over this extensive continent, of a monarchial nature, under certain restrictions and limitations. Those who openly avowed this sentiment were, it is true, but few; yet it is equally true, sir, that there was a considerable number, who did not openly avow it, who were by myself, and many others of the convention, considered as being in reality, favorers of that sentiment; and, acting upon those principles, covertly endeavoring to carry into effect, what they well knew openly and avowedly, could not be accomplished.

The second party, was not for abolition of the State governments, nor for the introduction of a monarchial government, under any form; but they wished to establish such a system, as could give their own States, undue power and influence in the government, over other States.

A third party, was what I considered truly federal and republican; this party was nearly equal in number with the other two, and was composed of the delegations from Connecticut, New York, New Jersey, Deleware, and in part from Maryland; also of some individuals from other representations. This party, sir, were for proceeding upon terms of federal equality; they were for taking our present federal system, as a basis of their proceedings, and, as far as experience had shown us that there were defects, to remedy those defects; as far as experience had shown, that other powers were necessary to the federal government, to give those powers. . . . But, sir, the favorers of monarchy, and those who wished the total abolition of State governments, well knowing, that a government founded on truly federal principles, the basis of which were the thirteen State governments, preserved in full force and energy, would be destructive of their views; and knowing they were too weak in numbers, openly to bring forward, their system; conscious also that the people of America, would reject it, if proposed to them,—— joined their interests with that party, who wished a system, giving particular States, the power and influence over the others, procuring in return, mutual sacrifices from them, in giving the government great and undefined powers, as to its legislative and executive, well knowing, that, departing from a federal system, they paved the way for their favorite object, the destruction of the State governments, and the introduction of monarchy."

The Constitution of the United States is different from the organic law of any other government, and was truly an experiment.

After the members of the convention (except a few who refused to sign it), had affixed their signatures to the Constitution, the convention adopted a resolution:

"That the preceding Constitution, be laid before the United States in Congress assembled, and that it is the opinion of this convention, that it should afterwards be submitted to a convention of delegates chosen in each State, by the people thereof, under the recommendation of its legislature, for their assent and ratification; and that each convention assenting to, and ratifying the same, shall give notice thereof to the United States in Congress assembled."

It was about three years, before the Constitution was ratified by all the States. It was not ratified by Rhode Island, until it had gone into effect, and a President had been elected.

Section 1 of Art. III is as follows: "The judicial power of the United States, shall be vested in one Supreme Court, and in such other inferior Courts, as the Congress may, from time to time, ordain and establish. The Judges, both of the Supreme, and inferior Courts, shall hold their offices, during good behavior, and shall, at stated times, receive for their services, a compensation, which shall not be diminished, during their continuance in office."

The Constitution had scarcely left the hands of its framers, before the great majority of the yeomanry, who had struggled for independence against the Crown, became fearful that it would eventually arrogate to itself, additional powers, fatal to the stability of the States, and it was this sentiment, that secured from the first Congress in 1789, the submission of the first ten amendments, all of which were additional restrictions upon the Federal government. The first eight of these amendments were drawn from the statute 1. William and Mary I., which settled the succession of the crown on its modern basis, and declared the rights of the subject. The essential provisions of these amendments, are embodied in the Declaration of Rights of every American State Constitution. Congress proposed the 11th amendment immediately following the decision of the Supreme Court, in 1793, in the case of Chisolm vs. Georgia (2 Dall. 419,) which held that a State could be sued by a citizen of another State. This amendment proposed by Congress was as follows: "The judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State."

It was promptly ratified by the States.

The 12th amendment grew out of the contested election, between Jefferson and Burr, for the Presidency of the United States.

The 13th, 14th and 15th amendments, were the outgrowth of the changed conditions, brought about by the war between the States. Of these amendments the most far-reaching provision is that contained in the 14th, that no State shall deprive any person of life, liberty or property without due process of law. It is asserted by high authority that the Fourteenth Amendment was not adopted in accordance with the requirements of the Constitution, as the ratification of Ohio, which was necessary to complete the requisite three-fourths, was withdrawn before the quorum of three-fourths had been filled up. In the Vth Art. of the Constitution, it is provided that no person shall be deprived of life, liberty or property without due process of law, but this was only a limitation upon the powers of the general government, while the provision in the 14th amendment was an inhibition on State action.

Cases arising under this provision have been prolific of bitter criticism on the part of the people against the decisions of the Court.

In the annual address before the Georgia Bar Association (1898) President John W. Akin said: "If these decisions are and continue to be the law of the land, one result is as sure, as the flight of time; the cities will grow relatively larger, and the towns relatively smaller. If history teaches anything, it is, that great cities are dangerous. Revolutions against despotism, do not originate in cities, or draw therefrom their main strength. Their very compactness of population, necessitates multiform limitations upon personal liberty. Thus the individual gradually becomes accustomed to obedience to a superior force, and reconciled to a species of servitude. When a man can not drink milk or eat meat until an officer inspects it, nor laugh or sing hymns, as loud as he wishes, for fear of a police ordinance against noises on the street, he loses somewhat of his individuality, and his sense of personal freedom is dulled. Accustomed therefore, to the imposition of personal restraint, he can not realize the gradual encroachments of power, and is in danger of finally submitting to, or even welcoming a despotism.

In the Revolutionary War, the rural State of South Carolina, sent more than 30,000 troops into the Army of Liberty; while the commercial State of New York, dominated by the City of New York, sent less than 3,000."

The vote on the adoption of the Constitution, was the first cause, after the triumph of our independence, which gave rise to intense rancor, between two great hostile parties,—the strict and liberal constructionists of the Constitution, the advocates of States Rights, and of a strong National government.

Judge Seymour D. Thompson, one of the foremost text writers of the age thus summarizes the danger, arising from the recent decisions of the Supreme Court:

"There is danger, real danger, that the people will see, at one sweeping glance, that all the powers of their governments, Federal and State, lie at the feet of us lawyers; that is to say at the feet of a judicial oligarchy; that those powers are being steadily exercised, in behalf of the wealthy and powerful classes, and to the prejudice of the scattered and segregated people; that the power thus seized, includes the power of amending the Constitution; the power of superintending the action not merely of Congress, but also of the State Legislatures; the power of degrading the two houses of Congress, in making those investigations they may deem necessary to wise legislation, to the powers which an English Court has ascribed to British Colonial legislatures; the power of superintending the judiciary of the States, of annulling their judgments, and of commanding them, what judgments to render; the power of denying to Congress the power to raise revenue by a method employed by all governments; making the fundamental sovereign powers of government, such as the power of taxation, the subject of mere barter, between corrupt legislatures, and private adventurers; holding that a venal legislature, temporarily invested with power, may corruptly bargain away, those essential attributes of sovreignty and for all time; that corporate franchises, bought from corrupt legislatures are sanctified and placed forever beyond recall by the people; that great trusts and combinations, may place their yokes upon the necks of people of the United States, who must groan forever under the weight, without remedy and without hope; that trial by jury and the ordinary criminal justice of the States, which ought to be kept near the people, are to be set aside, and Federal Court injunctions substituted therefor; that those injunctions extend to preventing laboring men from quitting their employment, although they are liable to be discharged by their employers, at any hour, thus creating and perpetuating a state of slavery.

There is danger that the people will see these things, all at once; see their enrobed judges doing their thinking on the side of the rich and powerful; see them look with solemn cynicism, upon the sufferings of the masses, nor heed the earthquake, when it begins to roll beneath their feet; see them present a spectacle not unlike that of Nero fiddling while Rome burns.

There is danger that the people will see all this at one sudden glance and that the furies will then break loose, and that all hell will ride on their wings."

The views of Judge Thompson, as well as the decisions giving rise to his criticisms, are more fully set forth in his address before the Bar Association of Texas, and published in No. 5 Vol. XXX of the American Law Review.

Prof. Burgess in "Political Science and Comparative Constitutional Law," says: "There is no provision in the constitution of the United States, any more than in the constitutions of other States [England, France and Germany] which clothes the judiciary with power to declare an act of the legislature generally null and void, on account of its repugnance to the constitution, or on any other account. . . . I do not hesitate to call the governmental system of the United States, the aristocracy of the robe; and I do not hesitate to pronounce this the truest aristocracy for the purposes of government, which the world has yet provided."

Three of the Presidents of the United States successfully resisted the Federal tribunals when attempting to interfere with executive, viz: Jefferson, Jackson and Lincoln, the last of whom in his inaugural address said:

"I do not forget the position assumed by some that constitutional questions are to be decided by the Supreme Court, nor do I deny that such decisions must be binding in any case, upon the parties to a suit, as to the object of that suit, while they are also entitled to a very high respect and consideration in all parallel cases by all other departments of the government; and while it is obviously possible that such decision may be erroneous in any given case, still the evil effect following it, being limited to that particular case, with the chance that it may be overruled and never become a precedent for other cases, can better be borne than could the evils of a different practice. At the same time the candid citizen must confess that if the policy of the government upon the vital questions affecting the whole people is to be irrevocably fixed by the decisions of the Supreme Court, the instant they are made as in ordinary litigation between parties in personal actions, the people will have ceased to be their own masters, unless having to that extent practically resigned their government into the hands of that eminent tribunal."

Thomas Jefferson said: "It has long been my opinion, that the germ of dissolution, of our Federal government is in the constitution of the Federal judiciary, an irresponsible body working like gravity by day and by night, gaining a little to-day and a little to-morrow and advancing its noiseless step like a thief, over the field of jurisdiction, until all shall be usurped from the States, and the government of all be consolidated into one."

One of the criticisms strenuously urged against this Court is its inconsistency. Perhaps the most conspicuous illustrations of its inconsistency are to be found in the Income Tax Cases, and the avalance of recent decisions practically overruling Norwood v. Baker, the majority of the Court now holding that an assessment of the cost of a street improvement, made arbitrarily according to the front foot, is not in violation of the Constitution of the United States for failure to provide any hearing or review thereof at which the property owner can show that his property was not benefitted to the amount of the assessment, and that the apportionment of the entire cost of a street pavement upon the abutting lots according to their frontage, without any preliminary hearing as to benefits, may be authorized by the legislature, and this will not constitute a taking of property without due process of law.

When we see these criticisms, emanating from high sources, and many others far more bitter, against a Court whose members are entitled to highest respect, and who have by their undoubted ability shed lustre throughout the judicial world, we naturally ask, what is wrong.

After long and careful consideration of this question, we have reached the conclusion that the evil lies in the fact that the members of this Court are practically free from accountability, and, being far removed from all contact with the people, unconsciously are influenced by their surroundings and become sympathizers with the wealthy and powerful.

If we are right in our diagnosis that the fault lies in the system, the question naturally arises what shall be the remedy. One remedy that has been suggested, is to curtail the jurisdiction of the Court, except as to those subjects over which jurisdiction is conferred by the Constitution, by amending the Judiciary Act, especially by a repeal of that provision allowing a writ of error to the State Courts: Another suggestion is to elect the Chief Justice in the same manner, in which the President is elected; that the Associate Justices should be elected by dividing the United States, into the same number of divisions, as there are Associate Justices of the Supreme Court, allowing one Associate Justice to each division, and in such a manner that only a part of the seats should be filled at any one election. We are satisfied that permanent relief can only come from amending the Constitution, so as to make the tenure of office only for a number of years, instead of during good behavior. We would suggest that they be elected for a term of nine years, one member of the Court to be elected every year by the House of Representatives. This would give the people an opportunity to make the election of a particular Judge, an issue in the campaign, and would be a check on that department of the government exercising Imperial powers.

The three cases that, perhaps, were most potent in determining whether we should have a national or a Federal government, were Marbury vs. Madison: McCullough vs. Maryland: and Gibbons vs. Ogden.

The first case in which Marshall as Chief Justice, was called upon to go deeply into the theory of our government was Marbury vs. Madison, a case familiar to the legal profession as a great land-mark of constitutional law, and which laid down the doctrine, that the Supreme Court had the power to declare an Act of Congress unconstitutional, and therefore null and void. The case of Marbury vs. Madison was decided in 1803, but Justice Iredell of the Supreme Court of the United States five years previously in Calder vs. Bull had said: "If an Act of Congress, or of the legislature of the State, violates those constitutional provisions, it is unquestionably void, though I admit that, as the authority to declare it void is of a delicate and awful nature, the Court will never resort to that authority, but in a clear and urgent case." The case of Marbury vs. Madison is, by reason of its wealth of learning, universally regarded as the leading case on this question, although its language was merely *obiter*.

The next great forward step of the Constitution, was McCullough vs. Maryland, famous in our judicial annals, because it involved a question absolutely vital to the States. In that case the Supreme Court decided that it had the power to declare the statute of a State unconstitutional, when it was repugnant to the Federal Constitution.

This decision practically felled the doctrine of States Rights, and made our government National in character.

This case was decided in 1819.

The case of Gibbons vs. Ogden, was decided in 1824, and upheld the exclusive power of Congress, to regulate commerce among the States. The argument in the case dealt largely with the question whether navigation is commerce.

In answering the question in the affirmative, Chief Justice Marshall used the oft quoted words: "Commerce undoubtedly is traffic, but it is something more, *it is intercourse*." These words seem to have been prophetic, as foretelling the railroad, the telegraph, the telepnone, and all the wonderful appliances, by which science compels nature to be the servant of man.

Senator Hoar in an instructive analysis of the decisions, in which the Sepreme Court of the United States, has declared Acts of Congress unconstitutional null and void, says: "Since the war, there have been fifteen cases in which Acts of Congress, have been held repugnant to the constitution.

Collector vs. Day, decided at the December term, 1870, holds that it is not competent for Congress, to impose a tax upon the salary of a judicial officer of a State.

This decision only limits, by construction, the general phraseology of an Act of Congress, holding that it cannot apply to the salary of a State officer, and should, therefore, hardly be included among those decisions, which hold Acts of Congress unconstitutional.

United States vs. Dewitt, holds that an Act of Congress, declaring it a misdemeanor to mix for sale, any naphtha and illuminating oil, unconstitutional, as being a police regulation, relating, exclusively, to internal trade of the State.

Gordon vs. Unitcd States, which holds unconstitutional the statute of March 3rd, 1863, so far as it authorizes an appeal, to the Supreme Court from the Court of Claims, in cases where that Court acts only as an auditor or assessor, reporting its decision to Congress.

Callan vs. Wilson which limits the general language of the statute, defining the jurisdiction of the Police Court of the District of Columbia.

United States vs. Fox, which holds a provision unconstitutional, which declares that every person respecting whom proceedings in bankruptcy are instituted, who within three months before their commencement, obtains goods upon false pretenses, shall be punished by imprisonment, on the ground that an Act, not an offense when committed, can not become such by a subsequent independent act, with which it had no connection.

United States vs. Steffens, which holds the statute of 1876, concerning trade marks, unconstitutional, as not limited to trade marks used in international or interstate commerce.

Boyd vs. United Statcs, which holds the Statute of June 22nd, 1874, unconstitutional, so far as it authorizes a Court of the United States, to require the defendant, in revenue cases, to produce his private books.

United States vs. R. R., holding a Statute taxing bonds of municipal corporations unconstitutional,

None of them deals with questions, about which different political parties or different sections of the country, are likely to be in conflict. Part of them only, deal with questions of great general interest, and in all of them the decision of the Court, I suppose, has met with universal acquiescence. These cases are eight in number.

There remain six cases dealing with legislation of the disturbed period, which followed the war to wit:

United States vs. Harris, where section 5519 of the Rev. Statutes, is declared unconstitutional, on the ground that Congress has no power, to pass a law punishing citizens of the States, for conspiring to deprive other citizens, of the equal protection of the laws of such States.

United States vs. Reese, which holds sections 3 and 4, of the Act of May 31, 1870, beyond the limit of the Fifteenth Amendment to the Constitution and unauthorized, as not confined in their operation to unlawful discrimination, on account of race, color, or previous condition of servitude.

The Civil Rights cases which hold the 1st and 2nd sections of the Civil Rights Act, unconstitutional.

Ex parte Garland, which holds a law unconstitutional, which provided that no person should be admitted to the bar of the Supreme Court, without first taking an oath, that he had never borne arms, against the United States, as being *expost facto*, and partaking of the nature of a bill of attainder.

Justice vs. Murray, which holds the statute of March 3rd, 1863, providing for a retrial in the Federal Court of facts tried by jury in the State Court unconstitutional.

United States vs. Klein, which holds the statute of July 12, 1870, null and void, providing that the acceptance of a pardon shall be exclusive evidence of the acts, purporting to be pardoned, as invading the powers, both of the judicial, and executive departments of the government.

These decisions six in number, are all in which the Court has held unconstitutional, Acts of Congress, in pursuance of the policy of the dominant party, in regard to what is called reconstruction. This summary comprehends every case, from the foundation of the government, in which the national legislative power has been held in check, by the Supreme Court, with a single exception which I shall speak of presently."

The single exception excluded from the Senators summary and which he reserved for special consideration is the Income Tax cases, in which the Court holds that a tax on the rent or income of property is a tax on the property, and therefore a direct tax, and incompetent to be constitutionally laid, otherwise than by apportionment among the several States according to population.

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